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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 100

INTERNATIONAL HARVESTER COMPANY,
Petitioner,

v.

W. WILLARD WIRTZ, *Secretary of Labor,*
United States Department of Labor, *et al.,*
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

P. R. LESCOHIER,
180 North Michigan,
Chicago 1, Illinois,

H. BASCOM THOMAS, JR.,
HUBARD T. BOWYER,
1313 Praetorian Life Building,
Dallas 1, Texas,
Counsel for the Petitioner.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, International Harvester Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court based upon a jury verdict in favor of the Defendant Petitioner.

OPINIONS BELOW

No opinion was rendered by the District Court. The Opinion of the Court of Appeals has not been reported but appears as Appendix I, the Judgment of the Court appears as Appendix II, the Order of the Court staying the issuance of the mandate appears as Appendix III, and the Judgment of the trial Court appears as Appendix IV, all attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

STATEMENT AND MATTERS INVOLVED

Petitioner, International Harvester Company, operates a retail store in Wichita Falls, Texas, from which it sells motor trucks, parts and farm implements to the general consuming public in that area. Ten of its employees at its Wichita Falls, Texas store sued herein for overtime compensation alleged to be due them under the provisions of the Fair Labor Standards Act, 29 U.S.C., 206, 207.

The Petitioner claimed its Wichita Falls, Texas store was exempt as a retail and service establishment, under Section 13(a)(2) of the Fair Labor Standards Act, 29 U.S.C., 213 (a)(2), and 29 U.S.C., 213 (a)(19), as amended.

The Respondent, Secretary of Labor, intervened herein solely for the purpose of having the Court enter a decla-

ratory judgment to determine that the petitioner's store at Wichita Falls, Texas was not exempt as a retail and service establishment under Section 13(a) (2) of the Act.

The case was tried to a jury. The Court under Rule 49(a) of the Federal Rules of Civil Procedure required the jury to return only a special verdict.

The issue submitted by the Court to the jury was:

"Special Issue No. 1:

"Do you find from a preponderance of the evidence that the sale of motor trucks to operators of five or more vehicles for business purposes by the Wichita Falls store of International Harvester Company are regarded as retail by the industry of which such establishment is a part?

"Answer Yes or No"

The jury answered "Yes."

The Respondent, the Secretary of Labor, requested the following issue to be submitted to the jury:

"Are sales of motor equipment, parts and services to operators of five or more vehicles for business purposes at a substantial discount regarded as *retail by the industry* of which the Defendant's Wichita Falls establishment is a part?"

The Petitioner, International Harvester Company, suggested in its requested charge this issue:

"The only issue for your determination is whether or not sales of motor trucks to customers operating five or more trucks for business purposes and which are not for resale, are recognized as retail *sales in the automobile and motor truck industry.*"

It will be noted that the Court in its charge stated "by the industry" instead of "in the industry" and left out the words "at a discount" from the charge. Neither the Respondent, Secretary of Labor, nor the individual Respondents made any objection to the Court's charge, as required by Rule 51 of the Federal Rules of Civil Procedure. The Court of Appeals held that although the Respondents did not object to the Court's charge, that the "plain error" doctrine applied and that the case should be sent back for another trial because the District Court in its charge said "by the industry" instead of "in the industry" and left out the words "at a discount."

The Court of Appeals did not pass on the merits of the case.

QUESTIONS PRESENTED

(a) Did the Court of Appeals in applying the "plain error" doctrine where no objection was made to the charge, as required by Rule 51 of the Federal Rules of Civil Procedure, render a decision conflicting with the decisions of the Court of Appeals for the Ninth Circuit on the same subject?

(b) Did the Court of Appeals in reversing the case, because the language "at a discount" was omitted from the charge, misapply Rule 49(a) with reference to omitted issues in special verdicts?

(c) Did the Court of Appeals in reversing the judgment of the District Court to the individual Respondents err because they did not give notice of appeal within the time required by law?

(d) Did the Court of Appeals err in reversing the judgment of the District Court since the error complained of was invited by the Respondent, Secretary of Labor?

APPLICABLE STATUTES

The applicable statutes are Sections 6 and 7 of the Fair Labor Standards Act, 29 U.S.C., 206, 207, and Section 13 (a) (2) of the Fair Labor Standards Act, 29 U.S.C., 213 (a) (2), reading as follows:

> "(a) The provisions of Sections 206 and 207 of this title shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

which was the statute in effect at the time this suit was instituted, and Section 13(a) (19), as amended by the Act of May 5, 1961:

> "The provisions of Sections 206 and 207 of this title shall not apply with respect to * * * (19) any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements,"

STATEMENT OF FACTS

It is undisputed that the District Court had jurisdiction of this case under the provisions of Section 16(b) of the Fair

Labor Standards Act, 29 U.S.C. 216 (b), and Title 28 U.S.C., Section 1337.

As stated above, this action was commenced, on February 24, 1961, by ten employees of the Petitioner at its Wichita Falls, Texas, retail store to recover overtime compensation alleged to be due them under the provisions of the Fair Labor Standards Act. The Secretary of Labor was permitted to intervene on May 22, 1962.

In answer to the individual Respondents' complaint and the intervention of the Secretary of Labor, the Petitioner, among other things, alleged that its employees at its place of business in Wichita Falls, Texas are not covered by the provisions of Sections 6 and 7 of the Fair Labor Standards Act, because such establishment was a retail sales and service establishment and exempt under Section 13(a)(2) of the Act since "more than 50 per centum of such establishment's annual dollar volume of sales of goods and services is made within the State of Texas in which said establishment is located and because more than 75 per centum of the annual dollar volume of sales of goods and services at said establishment are not for resale and is recognized as retail sales and services in the motor truck and farm implement sales and repair shop industry."

The Petitioner also claimed an exemption under Section 13(a)(2) of the Fair Labor Standards Act, as amended.

Solely for the purpose of showing that the jury was in no way misled, and that, consequently, the "plain error" exception is inapplicable, we point to the fact that the Peti-

tioner introduced in evidence an analysis of sales at its Wichita Falls store which, among other things, showed that sales contended by the Secretary of Labor to be non-retail sales other than sales at a discount to operators of five or more vehicles for business purposes, were less than twenty-five per cent of the total volume of sales, and that 26.1% of its sales were to operators owning five or more vehicles. Petitioner also introduced in evidence interrogatories propounded to the Respondents under the provisions of Rule 33 of the Federal Rules of Civil Procedure, together with their answers thereto, and requests for admission which were not answered by the Secretary of Labor and were, therefore, taken as admitted. In addition, the Petitioner introduced in evidence the testimony of eight witnesses who had been connected with the motor truck industry in one capacity or another for periods of time from fourteen years to forty years, all of whom testified without contradiction that sales to operators of five or more vehicles at a discount for business purposes were *recognized in the motor truck industry* as retail sales.

Every witness who testified was asked if he knew what is *recognized in the industry* as a retail sale and a wholesale sale. Each question was predicated upon what is recognized "in the industry" and not what is recognized "by the industry." Each answer related to "in the industry" and not "by the industry."

The Petitioner also introduced the testimony of the special counsel of the National Automobile Dealers Association, who had made surveys in 1950 and 1951, and a survey in

September, 1962 immediately prior to the trial of this case, for the National Automobile Dealers Association. This survey established that the vast majority of dealers do sell automobiles and trucks to operators of five or more vehicles for business purposes at a discount, and that from 86% to 96% of such dealers, depending upon the annual dollar volume classification of the dealers, regard such sales as retail sales.

As opposed to the foregoing testimony, the only evidence introduced by the Respondents was the testimony of Dr. Theodore Beckman, who stated he would have opposed the industry recognition test if he had been called upon to testify before Congress. He also testified he did not own a truck, had never purchased one and had never seen the Petitioner's Wichita Falls establishment.

In reply to the testimony of Dr. Beckman, the Petitioner introduced the testimony of Dr. Albert Haring Professor of Marketing at Indiana University, who testified he had seen the Petitioner's Wichita Falls establishment and testified contrary to the testimony of Dr. Beckman.

Each witness who was asked the question testified that the matter of the alleged "fleet discount" was more or less a fiction and was not observed; every sale was a negotiated sale and 99% involved a trade-in; that there was always haggling over the price; and that the matter of discount had no significance in changing the sale from retail to wholesale; that every customer gets a discount.

The Petitioner's District Manager testified without dispute that the Petitioner's Wichita Falls store constituted a part of the motor truck industry as well as the farm implement industry. (R. 170)

The parties entered into a Stipulation which, among other things, recites:

> "(4) That over 25% of the defendant's sales of goods and services at its Wichita Falls, Texas, store for the period in question were sales of motor trucks to customers operating five or more automobiles or trucks for business purposes at a discount.
>
> "(5) The plaintiffs and the intervener contend that (a) sales made to such operators made at a discount are not recognized in the industry as retail sales, and (b) can not be considered as within the concept of retail sales.
>
> "The defendant International Harvester Company contends that its sales of motor trucks at its Wichita Falls store during the period in question to operators of 5 or more automobiles or trucks for business purposes and not for resale are recognized as retail sales in the automobile, truck and farm implement industry.
>
> "(5) That the other sales contended by the plaintiffs and the Department of Labor to be non-retail sales are less than 25% of the total annual dollar volume of sales of goods and services at the defendant's Wichita Falls store for the period in question, and are therefore immaterial to a determination of any issue in this case.
>
> "(7) That more than 50% of the defendant's annual dollar volume of sales of goods and services at its Wichita Falls store were made within the State of Texas." (R. 389, 390)

The jury returned its verdict to the Court on the 9th day of October, 1962, and the Court entered its final judgment

disposing of all the issues in the case on October 19, 1962, in favor of petitioner (Appendix IV). The Respondent, Secretary of Labor, filed a motion for judgment n.o.v. or, in the alternative, for a new trial, on October 25, 1962. Omitting the formal parts, this entire motion recited:

> "That the evidence in the trial of this case shows that sales of equipment to operators of five or more vehicles, at a discount, are non-retail sales and, since such sales exceeded 25 per cent of the total sales made by the Defendant from its Wichita Falls establishment, that said establishment is not exempt as a retail establishment, that said establishment is not exempt as a retail establishment under the provisions of the Fair Labor Standards Act (29 U.S.C. 213(a)(2)."

This motion was overruled on January 21, 1963.

The Respondent, Secretary of Labor, filed a notice of appeal on March 22, 1963.

The individual Respondents filed no motion for directed verdict, no motion for judgment notwithstanding the verdict, no motion for new trial, and no apeal bond. They did file notice of appeal on March 22, 1963, in which they gave notice that they were appealing "from a final judgment entered herein on October 19, 1962 and from the order entered January 21, 1963, overruling Intervenor's Motion for Judgment I.O.V. or in the alternative for a new trial."

REASONS FOR GRANTING THE WRIT

Conflict of Decisions

The Court of Appeals in the instant case held that the "plain error" rule applies, even though the requirements of Rule 51 had not been followed, and remanded the case for a new trial because "by" was used instead of "in" and "at a dis-

count" was omitted from the special issue submitted to the jury.

The Court of Appeals for the Ninth Circuit in three recent cases has refused to follow the "plain error" rule where there has been a failure to comply with Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 provides:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *"

The three cases decided by the Court of Appeals for the Ninth Circuit are:

Bertrand v. Southern Pacific Company, 282 F.2d 568, wherein the Court stated:

> "Whatever the rule may be elsewhere, in this circuit the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused, where the ground asserted was not raised in the trial court. Hargrave v. Wellman, 9 circ., 276 F.2d 948, 950.
>
> "We hold that having failed in the trial court to object to the giving of the questioned instruction by stating distinctly the matter to which he objects and the grounds of his objection, appellant is precluded from obtaining a review thereof in this court."

Crespo v. Fireman's Fund Indemnity Company, 318 F.2d 174, in which the Court, after quoting Rule 51, recited:

> "The provisions of this rule were not complied with and appellant may not now complain of any error or

> inconsistency in the instructions. Although appellant urges us to apply the 'plain error' rule, this court has refused to apply that rule in civil cases when there has been a failure to comply with the requirements of Rule 51."

Rudick v. Prineville Memorial Hospital, 319 F.2d 764, in which the court stated:

> "Rules 46 and 51 of the Federal Rules of Civil Procedure here prevail. They are no mere technicalities. Johnston v. Reily, 82 U.S. App. D.C. 6, 160 F. 2d 249, 250. They have a genuine purpose, Crespo v. Fireman's Fund, 318 F. 2d 174 (9 Circ. 1963), essential to the orderly administration of justice. Southern Pac. Co. v. Villarruel, 9 Cir. 1962, 307 F. 2d 414, 415. Appellant urges the 'clear error' rule, but this court has refused to apply that rule in civil cases where there has been a failure to comply with the requirements of Rule 51. (See Crespo v. Fireman's Fund, supra, and cases cited in note 3 thereof.)"

This Court in the case of *U.S. v. Shaefer Brewing Company*, 356 U.S. 227, 2 L.Ed. 2d 721, granted a writ of certiorari, "because of an asserted conflict among the circuits and the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken from judgments of the district courts."

In *U.S. v. Gulf Refining Company*, 268 U.S. 542, 69 L.Ed. 1082, this Court in construing the then Section 240 of the Judicial Code, which is almost in identical language with 28 U.S.C. 1254(1), said with reference to granting a writ of certiorari:

> "The petition may be granted, notwithstanding the circuit court of appeals remanded the case for a new

> trial and did not render a final judgment therein. American Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372, 385, 37 L.Ed. 486, 491, 13 Sup. Ct. Rep. 758; Forsyth v. Hammond, 166 U.S. 506, 513, 41 L.Ed. 1095, 1098; 17 Sup. Ct. Rep. 665."

Inasmuch as there is a conflict in the decision of this Court in the instant case and the cases above cited and decided by the Court of Appeals for the Ninth Circuit, it is submitted that the uniform interpretation and application of Rule 51 is such a matter of public importance that this Court should grant the Writ of Certiorari and settle the question of whether or not the "plain error" rule should prevail in civil cases.

In the case at bar it appears without dispute in the record that this case was tried on the proper theory of law and all the evidence was based upon the matter of how the sales were recognized "in the industry" and not "by the industry". It further appears that the Petitioner submitted a proper charge in this respect.

This Court in the case of *U.S. v. Atkinson*, 297 U.S. 157, 80 L.Ed. 555, stated the rule as follows:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact * * * In exceptional circumstances, especially *in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fair-

> ness, integrity or public reputation of judicial proceedings."

and again in Johnson v. U.S., 318 U.S. 189, 199, 87 L.Ed. 704, 713, this Court approved the holding in the *Atkinson case*, in this language:

> "It is true that we may of our own motion notice errors to which no objection has been taken if they would 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' "

See also *Troupe v. Chicago, D & G Bay Transit Co.*, 234 F. 2d 253, Second Circuit.

It cannot be said from the record in this case that the error complained of and not objected to seriously affected the fairness, integrity or public reputation of judicial proceedings. On the contrary, the action of the Circuit Court of Appeals clearly does reflect on the fairness, integrity or public reputation of judicial proceedings, for it imposes a heavy burden on the defendant to retry a complicated case because of an error committed by the Court in no way induced by the Defendant. Furthermore, and of compelling importance, is the fact that an examination of the entire record convincingly shows that there is no basis whatsoever for believing that the jury's verdict would have been any different had the magic word "in" had been used rather than the word "by". In addition to the transcript of the proceedings, we direct the Court's attention to the fact that although Intervenor used the word "by" in its proposed special issue, it also used the phrase "retail in the industry" twice in its requested instructions, thus establishing that al-

though the words have a different technical meaning when viewed in the light of legislative history, they were used interchangeably to convey the same concept at the trial.

In contrast to the Intervenor's confusion in the use of terminology in its requested instructions, the Court should note that the Petitioner consistently used he proper terminology throughout in its suggested charge as well as in the trial.

Under these circumstances, it is clear that affirmance of the District Court's judgment would in no way adversely affect the fairness, integrity or public reputation of judicial proceedings, but, on the contrary, setting aside the District Court's judgment and remanding the case for retrial would have this effect. It is clearly unfair and will adversely affect the public reputation of judicial proceedings to set aside a jury verdict under the circumstances of this case.

The Court of Appeals in its Decision of This Case Misapplied Rule 49(a)

Rule 49(a) provides:

> "(A) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact * * * If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

Although the Court omitted from its special issue submitted to the jury "at a discount," under Rule 49(a) this omitted issue, if it was an issue, should be deemed to have been found by the Court. The law applicable to this situation is well-stated in *Barron & Holtzoff*, Vol. 2B, Section 105, Page 4, as follows:

> "Even where a party has requested submission of a particular issue, he will be held to have waived his right to trial by jury as to it unless he objects to the failure to submit it before the jury has retired. Though this may seem harsh, it has the salutary purpose of giving the judge an opportunity to correct any inadvertent failure to submit the issue."
>
> * * * * *
>
> "These provisions have been described as an outstanding contribution to the efficient and expeditious use of the special verdict, and 'a reasonable limitation on the right to a jury trial.' A liberal construction is essential."

It will be noted that the requested instruction submitted by the Respondent, Secretary of Labor, did not include the words, "at a discount," but "at a substantial discount," which is a different issue from that stipulated by the parties which the Court of Appeals says was binding upon the Petitioner.

Having properly rejected the Respondent Secretary of Labor's inclusion of the words, "at a substantial discount" for the reason that there was no evidence or stipulation to support such a request, the District Court acted within its discretion under Rule 49(a) in reserving this determination for the Court. As is specifically provided in the Rule, in the

absence of an objection the Respondent Secretary of Labor waived the right to a trial by jury of this issue.

The misapplication by the Court of Appeals of Rule 49(a) becomes completely clear when it is noted that Section 13 (a) (2) of the Act, which establishes the standards for claiming the retail exemption, in no way makes reference to the giving of a discount as a relevant factor in determining whether a sale is a retail sale. This concept was first interjected by the Wage and Hour Administrator in his Interpretative Bulletin published in 1956, 29 Code of Federal Regulations, Part 779.36, 21 F. R. 5056, July 7, 1956, when the Administrator described fleet sales as "sales of automobiles and trucks to national fleet accounts as designated by the various automotive manufacturers, at fleet discounts, and sales to other fleet accounts (customers operating five or more automobiles or trucks for business purposes) at discounts equivalent to those provided in sales to national fleet owners * * *"

This Bulletin, of course, does not have the force of law but rather states the informed judgment of the Administrator concerning the determination of what constitutes retail sales and is to be given the respect which its inherent logic warrants by the Courts. *Skidmore v. Swift & Co.*, 323 U.S. 134.

The setting aside of the verdict of the jury because of the failure to include the phrase "at a discount" is clearly inconsistent with the standards established for taking this exceptional action in this Court's decision in *U.S. v. Atkinson*, 297 U.S. 157, 80 L.Ed. 555, quoted above.

The Error Complained of Was Invited by the Respondent, Secretary of Labor

It appears from the record herein that the Respondent Secretary of Labor requested the Court to submit to the jury whether "sales of motor equipment, parts and services to operators of five or more vehicles for business purposes at a substantial discount are regarded as retail *by the industry* of which the Defendant's Wichita Falls establishment is a part," and the Court submitted *by the industry* in the language as requested by the Respondent Secretary of Labor. It thus appears that the error complained of was invited by the Secretary of Labor when he requested the Court to submit the question "by the industry" instead of "in the industry". In the case of *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, cert. denied, 368 U.S. 929, 7 L.Ed. 2d 192, the Court stated:

> "A party cannot complain of an alleged error in instructions when the same error is found in its own instructions."

In support of that statement, among other cases the Court cited *Silverman v. Travelers Insurance Co.*, 277 F.2d 257, Fifth Circuit, where the Court stated:

> "A party cannot object to a portion of a charge which was a paraphrase of his requested instruction."

The Respondent Secretary of Labor having led the Court into error, ought not now to be permitted to take advantage of it.

The Individual Respondents Did Not Give Notice of Appeal in the Time Required by Law

The verdict of the jury was returned into Court on the 9th day of October, 1962. The Court entered its final judgment disposing of all the issues in the case, both the claims of the individual Respondents and the claim of the Respondent, Secretary of Labor, on October 19, 1962. The individual Respondents filed nothing until the notice of appeal was filed on March 22, 1963. The contention is made, and the Court of Appeals so decided, that the filing of the motion for judgment n.o.v. or, in the alternative for a new trial, by the Secretary of Labor on October 25, 1962, suspended the validity of the judgment so far as the individual Respondents were concerned although they did not join in this motion. In support of its position the Court of Appeals cites *Phinney v. Houston Oil Field Material Company*, 252 F.2d 357. This case construes Rule 54(b), Federal Rules of Civil Procedure, which provides:

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to

revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. As amended Apr. 17, 1961, eff. July 19, 1961."

It is apparent from the record in this case that Rule 54(b) does not apply because on October 19, 1962, the District Court entered a final judgment in which it disposed of the claims of all the parties. Rule 73(a) of the Federal Rules of Civil Procedure requires:

"When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry * * * The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

It will be noticed that the notice of appeal given by the individual Respondents was 144 days after the entry of the judgment from which they appealed. The filing of a motion for new trial by the Respondent Secretary of Labor did not inure to the benefit of the individual Respondents who filed

none of the motions enumerated in Rule 73(a), filed no appeal bond and took no action other than to give notice of appeal.

Giving of notice of appeal within the time required under Rule 73 is jurisdictional. *Knowles v. U.S.*, 260 F.2d 852; *Donovan v. ESSO Shipping Company*, 259 F.2d 65, cert. denied, 359 U.S. 907, L.Ed. 2d 572.

This matter was brought to the attention of the Court of Appeals by the Petitioner's Motion to Dismiss the Appeal of the Individual Respondents.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant certiorari to review the judgment of the Court of Appeals, and that the judgment of the Court of Appeals be reversed and case remanded to that Court for a decision of the case on its merits, and that such other and further orders be entered as the Court may deem necessary in the premises.

P. R. LESCOHIER,
180 North Michigan,
Chicago 1, Illinois,

H. BASCOM THOMAS, JR.,
HUBARD T. BOWYER,
1313 Praetorian Life Building,
Dallas 1, Texas,

By Hubard T. Bowyer
Counsel for the Petitioner,
International Harvester
Company.

APPENDIX 1

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20635

W. WILLARD WIRTZ, *Secretary of Labor*, United States Department of Labor, *et al.*,
Appellants,

v.

INTERNATIONAL HARVESTER COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(April 15, 1964.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a judgment, following a jury verdict, determining that the local "store" of International Harvester Company, in Wichita Falls, Texas, was entitled to the retail or service establishment exemption contained in Section 13(a)(2) of the Fair Labor Standards Act. 29 U.S.C.A. § 213(a)(2).[1]

[1] The definition contained in the Act is: "A 'retail or service establishment' shall mean an establishment 75 percentum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services *in* the particular industry." (Emphasis added)

The litigation was commenced by the filing of a suit by the individual plaintiffs, employees of the Wichita Falls outlet of the appellee, who sued for alleged unpaid overtime compensation due them under the Fair Labor Standards Act. There is no dispute but that they were underpaid if they were covered employees. The Secretary of Labor was permitted to intervene for the purpose of having the Court enter a declaratory judgment determining whether the employer's Wichita Falls store was a retail and service establishment within the meaning of Section 13(a)(2).

The parties stipulated in the trial court "that over 25% of the defendant's sales of goods and services at its Wichita Falls, Texas, store for the period in question were sales of motor trucks to customers operating five or more automobiles or trucks for business purposes *at a discount*." (Emphasis added.)

In his requested instruction submitted to the trial court, the Secretary included the following proposed special interrogatory: "Are sales of motor equipment, parts and services to operators of five or more vehicles for business purposes *at substantial discount*, regarded as retail *by* the industry of which the defendant's Wichita Falls establishment is a part?" The requested instructions also included the following statement: "All other issues in this case have been eliminated by agreement of the parties and are not for your consideration."

In the quotations hereafter certain words will be emphasized by the Court because of their special significance in the discussion of the case.

The Court, in its charge to the jury, stated: "The only issue for your determination is whether sales of motor vehicles, by the Wichita Falls store of the International Harvester Company, to operators of five or more vehicles are recognized as retail sales *by* the industry of which that establishment is a part."

The Court then stated that the jury would answer "yes" or "no" to a special issue, that special issue being worded as follows: "Do you find from a preponderance of the evidence that the sale of motor trucks to operators of five or more vehicles for business purposes by the Wichita Falls, Texas, store of the International Harvester Company, are regarded as retail *by* the industry of which such establishment is a part?" The Court omitted any reference to the fact that the sales were at a discount.

The jury answered the special issue "Yes." The Secretary filed a motion for a judgment notwithstanding the verdict, which motion was overruled, and this appeal followed.

On the trial there was substantial documentary evidence introduced showing the nature of sales and services performed by the Wichita Falls store of International Harvester Company. There was testimony by the manager detailing the nature of the business carried on by him, and there was evidence given by several persons identified with either the "automobile" or the "automobile and motor truck" or the "motor truck and farm machinery" industries. The testimony of these persons was all to the effect that all

sales of the kinds in evidence, except where they were made for resale, were regarded in the industry as to which they testified as retail sales. This evidence was further supported by an expert who, although he expressed some doubts as to the correctness of the industry's appreciation of the distinction between wholesale and retail, did testify that as he understood the industry the resale test was the distinction between wholesale and retail sales, and that the question of whether sales were made to large purchasers either with or without a discount had no relevance to the issue.

On the Government's side, the expert witness testified that the sales in question made to purchasers of "fleet" quantities at a discount were not regarded in the industry as retail sales.

On this appeal, both the Secretary and the appellee seek, to some degree, to undo what was done by them or, at least without objection from them, in the trial court. For instance, although International Harvester stipulated that more than 25% of the sales were sales to customers operating five or more automobiles or trucks for business purposes *at a discount*, they now seem to contend that there was a fact issue as to whether there was any discount in the sales involved, claiming, as they do, that each sale was a negotiated sale and that there was no proof from which a jury would be compelled to find the existence of a discount. So, too, does the Secretary seek to raise issues other than those embodied in the special issue, although he agreed in the

stipulation that all other issues have been eliminated and were not for the jury's consideration.

Also, and more important, the Secretary here objects that the special issue, as presented to the jury, was clearly and patently erroneous in two respects. The first is that the question as propounded by the Court asked whether such sales were regarded as retail *by* the industry; whereas the statute provides that in order to be entitled to the exemption the sales must be regarded as retail *in* the industry. The second point made by the Secretary is that although the parties stipulated that the sales were made *at a discount* and that a sale at a discount to purchasers of multiple units is one of the important criteria in determining the issue of retail versus nonretail, the trial court omitted the words "at a discount" in the special issue.

Appellee points out that the Secretary made no objection to the charge as given or to the special issue as framed by the Court, and says that under Rule 51 of the Federal Rules of Civil Procedure, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects in the grounds of his objection." And, likewise, with respect to special verdicts and interrogatories under Rule 49, the burden is on the complaining party to show that he made specific objection to the form of the special verdict.

Moreover, appellee stresses the fact that in his own requests to charge, the Secretary's counsel used the language

"by the industry," rather than "in the industry," whereas appellee, in its requests to charge used the correct formulation.

The Court can well understand the frustration felt by a litigant who completes a complicated trial resulting in a jury verdict in his favor where the issue passed on by the jury has been substantially agreed to by both parties only to have the verdict attacked on appeal on the ground that the wrong issue was presented. Moreover, out of a proper regard for the integrity of the judicial system, and to avoid relatively minor oversights by the trial court being magnified into substantial error on appeal, the Federal Rules, 51 and 49, require the aggrieved party to assign error at the time of the giving of the charge or presenting of the special verdict in order to have the right to challenge errors in the charge or the form of the special verdict on appeal.

Nevertheless, when it is apparent, as it was here, that all parties and the Court were thoroughly familiar with the requirement that the International Harvester Company carry the burden of proving how the sales were regarded *in* the industry rather than *by* the industry, it was just as much the responsibility of the appellee to see that the issue was properly phrased as it was that of the Secretary, so far as achieving justice in the case was concerned.

If the Court were here attempting to mete out some degree of sanctions to the party who brought about the erroneous formulation by the trial court, this would be a simpler matter, because it is apparent that the language as relates to the magic word "by" instead of "in" was suggested

by the appellant. However, this is not true of the failure of the trial court to include the words "at a discount," which the parties had stipulated to be one of the facts affecting sales. Here, the Secretary requested an inclusion of the words "at a discount," whereas the appellee omitted these words from the special verdict suggested by it. And yet, here too, no objection was made by the Secretary after the Court failed to include this language in its actual charge or in the special verdict as submitted to the jury. There was, of course, the written request filed with the Court.

This litigation is not, of course, a private contest. It is litigation touching upon the proper application of the Wage and Hour law, which has a broad public purpose independent of the rights of the particular persons who appeared as the original plaintiffs in the suit below. Other employees of this local installation may have rights that are affected by the proper determination of this case. Also, the coverage of the Act as to similar installations is delineated by the Courts' decisions with respect to each case presented to them.

In view of the broader interest than that of the immediate litigants in the correct determination of the case before us, we look to see whether this is a case in which the Court should follow the "plain error" rule and consider the grounds of appeal, which amount to plain error even though the requirements of the rules of procedure were not followed. This Court has, of course, recognized its right to consider grounds of appeal, notwithstanding a failure to comply with

the requirements of Rule 51. In *Mondshine v. Short*, 5 Cir., 196 F.2d 606, this Court stated:

> "In this case we do not find it necessary to reach a decision of that question [the effect of the requirements of Rule 51 when read in conjunction with Rule 46] because the error was so fundamental as not to submit to the jury the essential ingredients of the cause of action. It is one of those exceptional cases where the error is so basic, plain and clear as to prompt this Court to consider the question to avoid the injustice which might otherwise result."

The Supreme Court has said in *Hormel v. Helvering*, 312 U.S. 552, at page 557:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Here, there is no doubt but that the special issue presented to the jury was wrong. To a trial judge who had not had previous experience with this precise section, the error would not be apparent, because it is an error that arises from a failure to use the precise statutory terminology.

Since the parties stipulated that the sales in question were made "at a discount" and since it was stipulated that the Secretary's contention that these were nonretail sales included that ingredient, it was also error for the trial court not to have included this factor in the special issue presented

to the jury. Of course, the exact language of the special verdict or special issue is of extreme significance, not only in that it excludes from the jury's consideration all else, but also because it is in the jury room for constant reading and consideration by the members of the jury. If they properly perform their duty they analyze each word of it and consider its significance in light of the testimony given. On this special verdict the jury was, in effect, told that it was not its concern whether the sale to purchasers of more than five vehicles were made "at a discount" or not. They were also told that the question before the jury was whether the members of the industry themselves regarded the sales as retail rather than what objective testimony would prove to their satisfaction was the manner in which these sales are regarded in the industry. We have previously pointed out that this is a significant difference, See *Mitchell v. City Ice Co.*, 5 Cir., 27 F.2d 560.

We conclude that the submission of the erroneous issue to the jury and the failure "to submit to the jury the essential ingredients of the cause of action" (*Mondshine v. Short, supra*) makes this one of the exceptional cases, where the error is so "basic, plain and clear" as to require this Court to reverse the judgment, and remand the case for further proceedings.

The appellee has moved to dismiss the appeal of the individual appellants on the ground that they did not file their notice of appeal until after the expiration of the statutory period. It is its contention that the motion for judg-

ment n.o.v., or in the alternative, for a new trial, filed by the Secretary did not extend the time for filing appeal on behalf of the individual plintiffs. We conclude that this Court has resolved this issue contrary to the contentions of the appellee in *Phinney v. Houston Oil Field Material Co.*, 5 Cir., 252 F.2d 537. The motion to dismiss the appeal of the individual appellants is, therefore, denied.

The Secretary contends on this appeal that the trial court should have granted a summary judgment or should have directed a verdict in his favor on the ground that the appellee failed to carry its burden of adducing sufficient proof of the retail nature of these sales to warrant the case being submitted to the jury. While there is considerable confusion as to the precise "industry" with reference to which the several witnesses testified, we conclude that this is a matter that should be left open for consideration in the trial court when a new trial is had, since it is apparent that the Secretary did not file a motion for directed verdict nor, in his motion for a judgment n.o.v., did he expressly call the attention of the court to the defects of proof on which the motion was based.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX II

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1963

D. C. Docket No. 1111—Civil Action

W. WILLARD WIRTZ, *Secretary of Labor, United States Department of Labor, et al.*,
Appellants,

v.

INTERNATIONAL HARVESTER COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

April 15, 1964

Issued as Mandate:

APPENDIX III

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 20635

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, *et al.*,

Appellant,

v.

INTERNATIONAL HARVESTER COMPANY,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of

thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 30th day of April, 1964.

s ELBERT P. TUTTLE
United States Circuit Judge

(ORIGINAL FILED—May 1, 1964)

APPENDIX IV

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS WICHITA FALLS DIVISION

Civil Action No. 1444

ALVIN E. JETER, ET AL.,

v.

INTERNATIONAL HARVESTER COMPANY

October 9, 1962

On October 8, 1962, this cause came on regularly for trial. The Plaintiffs, Alvin E. Jeter, J. Dwayne Jones, W. L. Skelton, Jr., George H. Wood, John Albert Wood, Chester L. Cochran, Frank Moreno Vasquez, Santos B. Angel, Glen C. Isacs, and Harold D. Lindsey, and the Intervener Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, and the Defendant International Harvester Company, all appeared and by their respective counsel announced ready for trial.

It appears to the Court that the Plaintiffs are suing for overtime compensation under the Fair Labor Standards Act, Title 29, United States Code, Sec. 301, et seq., and that the Intervener Arthur J. Goldberg is seeking a declaratory judgment to determine that the Defendant International Harvester Company in its operations at its Wichita

Falls, Texas, store does not operate a retail or service establishment within the operation of Sec. 13(a) (2) of the Fair Labor Standards Act (29 U.S.C. 213(a) (2), and is seeking such declaratory judgment as to the rights and other legal relations of the parties hereto under the provisions of 28 United States Code 2201 and 28 United States Code 1337; and it further appears to the Court that this Court has jurisdiction of this cause under the provisions of Sec. 16(b) of the Fair Labor Standards Act, Title 29, United States Code, Sec. 216(b) and Title 28, United States Code, Sec. 1337.

Thereupon a jury of good and lawful qualified citizens of the Northern District of Texas, Wichita Falls Division, was duly impaneled and sworn the facts to try. The case proceeded to trial before the Court and jury, and the jury after hearing the pleadings, the evidence, the argument of counsel, and the charge of the Court upon a special issue (all other issues having been agreed upon and stipulated between the parties hereto according to their stipulations on file herein), retired to consider its verdict; and on the 9th of October, 1962, returned into Court its verdict as follows:

"Special issue No. 1: Do you find from a preponderance of the evidence that the sale of motor trucks to operators of five or more vehicles for business purposes by the Wichita Falls, Texas, store of the International Harvester Company are regarded as retail by the industry of which such establishment is a part? Answer yes or no."

to which issue the jury answered "Yes" with verdict signed by its foreman Merle Thomas Waggoner, which verdict was received and approved in open Court.

Upon the evidence and the verdict of the jury, the Court is of the opinion and so finds that the Plaintiffs and the Intervener and each of them should take nothing by their suit and Intervention against the Defendant International Harvester Company; and upon the evidence and verdict of the jury the Court should declare and determine that the Defendant International Harvester Company in its operations at Wichita Falls, Texas, does operate a retail or service establishment within the meaning of Sec. 13(a) (2) of the Fair Labor Standards Act, 29 United States Code 213(a) (2); and that the provisions of Sec. 206 and 207 of Title 29, United States Code (Fair Labor Standards Act) do not apply to any employee employed by the International Harvester Company at its Wichita Falls, Texas, store.

It is therefore Ordered, Adjudged and Decreed:

(1) That the Plaintiffs and each of them take nothing by their suit against the Defendant International Harvester Company and that it go hence without day and recover its costs.

(2) That upon the Intervention of Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, the Court declares and determines that the operations of the Defendant International Harvester Company at its Wichita Falls, Texas, store, is a retail or service establishment within the meaning of 29 United States Code, Sec. 213(a) (2) and that Sec. 206 and 207 of Title 29, United States Code

(Fair Labor Standards Act), do not apply with respect to any employee employed by Defendant International Harvester Company at its Wichita Falls, Texas, store.

Dated and entered this 19 day of October, 1962.

SARAH T. HUGHES,
Judge.

PROOF OF SERVICE

The undersigned, counsel for Petitioner, International Harvester Company, hereby certifies that on this date he deposited a copy of the foregoing Petition for Writ of Certiorari in the United States mail at Dallas, Texas, with first class postage prepaid, addressed to the Honorable Archibald Cox, Solicitor General of the United States, United States Department of Justice, Washington 25, D.C., and a copy of the foregoing Petition for Writ of Certiorari to Honorable Charles Donahue, Solicitor of Labor, Department of Labor, Washington 25, D.C. and Miss Bessie Margolin, Assistant Solicitor of Labor, United States Department of Labor, Washington 25, D.C., attorneys for the Respondent, W. Willard Wirtz, Secretary of Labor; and a copy of the foregoing Petition for Writ of Certiorari to Honorable Lawrence Paul Hochberg, Southland Center, Dallas 1, Texas, attorney for the individual Respondents, Alvin E. Jeter, et al.

Dated this the day of May, 1964.

HUBARD TAYLOR BOWYER,
Counsel for the Petitioner,
International Harvester Company